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The CJPTA: A Decade of Progress

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Cross-Border Transfers of Court Proceedings

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Cross-Border Transfers of Court Proceedings

Abstract

The Court Jurisdiction and Proceedings Transfer Act might easily have been two statutes rather than one. There could have been a pair of uniform acts, one delineating the territorial competence of the provinces' superior courts and the other implementing a regime for the cross-border transfer of court proceedings. After all, these two matters are neither logically interdependent nor especially tightly linked. Part 3 of the CJPTA, dealing with transfers of proceedings, is not confined to lawsuits where the initial court takes jurisdiction under Part 2. It applies regardless of whether the initial court bases its jurisdiction on the CJPTA or on some other legislation, such as a specialized family law statute. Indeed, it applies when the transferring court does not have territorial competence at all. While the matters dealt with, respectively, in Parts 2 and 3 of the CJPTA certainly fall within the broad domain of private international law, they are no more closely affiliated than other fields where the CJPTA's progenitor, the Uniform Law Conference of Canada ("ULCC"), elected to deal with matters in discrete statutes. For example, the ULCC chose to address cross-border enforcement by drafting separate uniform acts dealing with recognition of (1) Canadian civil judgments, (2) foreign-country civil judgments, (3) international arbitral awards, (4) foreign subpoenas, (5) foreign maintenance and custody orders, (6) foreign child welfare orders, and (7) foreign judgments based on a contract containing an exclusive forum-selection clause. In short, the ULCC has not been in the habit of drafting sweeping, comprehensive uniform acts but rather has elected to advance in increments. It has been a splitter, not a lumpier.

Cover Page Footnote

Thanks to Stephen Pitel, John MacCormick, the participants in the 2016 Toronto symposium on the Court Jurisdiction and Proceedings Transfer Act, and two external examiners for comments on drafts.

Special Issue

The *CJPTA*: A Decade of Progress

Cross-Border Transfers of Court Proceedings

VAUGHAN BLACK*

To thee I have transferred / All judgment

Paradise Lost, Book X, 56-57

THE *COURT JURISDICTION AND PROCEEDINGS TRANSFER ACT*¹ might easily have been two statutes rather than one. There could have been a pair of uniform acts, one delineating the territorial competence of the provinces' superior courts and the other implementing a regime for the cross-border transfer of court proceedings. After all, these two matters are neither logically interdependent nor especially tightly linked. Part 3 of the *CJPTA*, dealing with transfers of proceedings,² is not confined to lawsuits where the initial court takes jurisdiction

* Schulich School of Law, Halifax. Thanks to Stephen Pitel, John MacCormick, the participants in the 2016 Toronto symposium on the *Court Jurisdiction and Proceedings Transfer Act*, and two external examiners for comments on drafts.

1. Uniform Law Conference of Canada, *Proceedings of the Seventy-Sixth Annual Meeting, 1994*, Appendix C: *Court Jurisdiction and Proceedings Transfer Act*, online: <www.ulcc.ca/images/stories/1994_EN_pdf/1994ulcc0008_Court_Jurisdiction_Proceedings_Transfer_Act.pdf> at 140 [*CJPTA*]. The *CJPTA* has been brought into force in three provinces: Saskatchewan (see *The Court Jurisdiction and Proceedings Transfer Act*, SS 1997, c C-41.1); British Columbia (see *Court Jurisdiction and Proceedings Transfer Act*, SBC 2003, c 28); and Nova Scotia (see *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003, (2nd Sess), c 2).
2. The Uniform *CJPTA* and the Saskatchewan and British Columbia versions are divided into three numbered parts, the first of which is headed "Interpretation." Unhelpfully, Nova Scotia's *CJPTA* does not assign a number to the opening interpretation part, so it is out of step with the other three. I go with the majority, so throughout this paper "Part 2" refers to the *CJPTA*'s sections addressing territorial competence and "Part 3" denotes those dealing with transfers of proceedings.

under Part 2. It applies regardless of whether the initial court bases its jurisdiction on the *CJPTA* or on some other legislation, such as a specialized family law statute. Indeed, it applies when the transferring court does not have territorial competence at all. While the matters dealt with, respectively, in Parts 2 and 3 of the *CJPTA* certainly fall within the broad domain of private international law, they are no more closely affiliated than other fields where the *CJPTA*'s progenitor, the Uniform Law Conference of Canada ("ULCC"), elected to deal with matters in discrete statutes. For example, the ULCC chose to address cross-border enforcement by drafting separate uniform acts dealing with recognition of (1) Canadian civil judgments, (2) foreign-country civil judgments, (3) international arbitral awards, (4) foreign subpoenas, (5) foreign maintenance and custody orders, (6) foreign child welfare orders, and (7) foreign judgments based on a contract containing an exclusive forum-selection clause.³ In short, the ULCC has not been in the habit of drafting sweeping, comprehensive uniform acts but rather has elected to advance in increments. It has been a splitter, not a lumpner.

No doubt there are solid reasons for this piecemeal and gradual approach to uniform legislation. For one thing, a uniform act dealing with a wide range of matters and offered to the provinces on an all-or-nothing basis might be enacted by none. A fragmentary method seems better geared to increasing the likelihood of provincial adoption. Whatever the explanation for this piecemeal approach, when it came to the *CJPTA*, the ULCC did not adhere to it. It opted instead to weld together two distinct matters.⁴ There is nothing disastrous about this. It does mean, however, that generalizations about one of the *CJPTA*'s two main parts may

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3. Respectively these are the following: (1) Uniform Law Conference of Canada, *Uniform Enforcement of Canadian Judgements and Decrees Act* (Whitehorse: Uniform Law Conference of Canada, 1997); (2) Uniform Law Conference of Canada, *Uniform Enforcement of Foreign Judgements Act* (Fredericton: Uniform Law Conference of Canada, 2003); (3) Uniform Law Conference of Canada, *Uniform International Commercial Arbitration Act* (Victoria: Uniform Law Conference of Canada, 1987); (4) Uniform Law Conference of Canada, *Uniform Interjurisdictional Subpoenas Act* (Whitehorse: Uniform Law Conference of Canada, 2012); (5) Uniform Law Conference of Canada, *Maintenance and Custody Enforcement Act* (Uniform Law Conference of Canada); (6) Uniform Law Conference of Canada, *Inter-Jurisdiction Child Welfare Orders Act* (Yellowknife: Uniform Law Conference of Canada, 1989); and (7) Uniform Law Conference of Canada, *Uniform Choice of Court Agreements Convention Act* (Québec City: Uniform Law Conference of Canada, 2008). All can be found on the Uniform Acts section of the ULCC's website (see Uniform Law Conference of Canada, "Uniform Acts Information," online: <www.ulcc.ca/en/uniform-acts-new-order>).
 4. For argument on why the *CJPTA* should be split into two statutes, see Stephen Pitel & Vaughan Black, "Time for New Tools to Manage Interprovincial Commercial Litigation," *The Lawyer's Daily* (1 November 2017), online: <www.thelawyersdaily.ca/articles/4970/time-for-new-tools-to-manage-interprovincial-commercial-litigation>.

have little applicability to the other. Moreover, when one of the two conjoined parts thrives and the other does not, as has been the case with the *CJPTA*, we may tend to overlook the latter's existence and speak as if the *CJPTA* was no more than its provisions dealing with territorial competence and *forum non conveniens*. The Supreme Court of Canada was guilty of this in *Club Resorts Ltd v Van Breda* when it described the *CJPTA* as “a uniform Act to govern issues related to jurisdiction and to the doctrine of *forum non conveniens*.”⁵ In the same vein, in *Teck Cominco Metals Ltd v Lloyd's Underwriters*⁶ the Supreme Court stated that the purpose of the *CJPTA* was to bring Canadian law into conformity with *Morguard*⁷ and *Anchem*.⁸ These three statements make sense as a description of Part 2 of the *CJPTA*. However, they have no bearing on Part 3. The symposium at which this article was originally presented adopts a similar perspective. Its subtitle—“A Decade of Progress”—seems more focused on Part 2 of the *CJPTA* than Part 3, where not a lot has happened. Reflecting this, many of the symposium papers considered the former, and only this paper analyzed the latter.

All this is understandable. While Part 3 of the *CJPTA*—the transfer part—is longer than Part 2, with more sections and more words, it has generated much less judicial activity, and none at the Supreme Court of Canada. There are some plausible explanations for this. Part 3 is confusing reading. Its ungainly provisions deal with both the power of the superior courts⁹ of a *CJPTA* province to initiate a transfer, and with that of the second court to accept and conclude one, while shifting back and forth between the two. Moreover, unlike the part dealing with territorial competence, which simply reconfigures familiar territory, Part 3 of the *CJPTA* enacts something new. There are no precedents in Canada or elsewhere for a comprehensive regime for cross-border transfers of judicial

5. *Club Resorts Ltd v Van Breda*, 2012 SCC 17 at para 40, [2012] 1 SCR 572.

6. 2009 SCC 11 at para 22, [2009] 1 SCR 321. This passage was cited with approval in *Lapointe Rosenstein Marchand Melançon LLP v Cassells Brock & Blackwell LLP*, 2016 SCC 30 at para 113, [2016] 1 SCR 851.

7. *Morguard Investments Ltd v De Savoye*, [1990] 3 SCR 1077, 76 DLR (4th) 256.

8. *Anchem Products Inc v British Columbia (Workers' Compensation Board)*, [1993] 1 SCR 897, 102 DLR (4th) 96.

9. But not appellate courts. In *Liu v Composites Atlantic Ltd*, a party who had not requested a transfer before the trial court asked the appeal court to initiate one. The Nova Scotia Court of Appeal rightly observed that the “power to transfer a proceeding is given to the Supreme Court of Nova Scotia, not to the Nova Scotia Court of Appeal.” See *Liu v Composites Atlantic Ltd*, 2013 NSCA 142 at para 15, 339 NSR (2d) 30.

proceedings.¹⁰ Among the novel questions arising from cross-border transfers of court proceedings are: which jurisdiction's limitation period governs a transferred proceeding, what happens to a pre-trial motion that is incomplete at the time a transfer is made, what happens if the initial court makes a transfer request and then changes its mind about the terms of that request, and what happens if a transfer is made contingent on the transferee court complying with certain terms or conditions and those conditions later become impractical.¹¹ These, and a number of other details, are dealt with in Part 3. They are somewhat clarified in the ULCC's commentary on the *CJPTA*¹² and more fully explored in the relevant chapter of the one book devoted to the statute, *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act*.¹³ Nevertheless, much about

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10. There are, however, some precedents that apply in limited circumstances. See *e.g.*, *Divorce Act*, RSC 1985, c 3 (2nd Supp), s 6. This section applies in child custody matters in divorce petitions. For other instances of provisions permitting some version of a cross-border transfer of judicial proceedings, see Vaughan Black, Stephen GA Pitel & Michael Sobkin, *Statutory Jurisdiction: An Analysis of the Court Jurisdiction and Proceedings Transfer Act* (Toronto: Carswell, 2012) at 215-21.
 11. This last matter is dealt with in the *CJPTA*. See *CJPTA*, *supra* note 1, s 22. Section 15(2) allows a court issuing a transfer request to impose conditions precedent and also dictate terms concerning the further conduct of the proceedings (*ibid*). There is some dispute as to whether those terms and conditions may only be imposed on the parties or may, in the alternative or in addition, be dictated directly to the receiving court. See *e.g.* *Gillis v BCE Inc*, 2014 NSSC 279, 348 NSR (2d) 276. In this case the court was asked to impose conditions directly on the transferee court. Although it elected not to issue a transfer request at all, the court expressed no concern with the notion of such a condition. See also *Cresswell v Cresswell Estate*, 2017 BCSC 1183, 281 ACWS (3d) 522. In *Cresswell*, the BC Supreme Court took the view that, while terms and conditions might be imposed on the parties, it would be "presumptuous and inappropriate" to impose conditions on the receiving court's conduct of the hearing (*ibid* at para 5). While imposing or attempting to impose conditions directly on a foreign court would indeed be presumptuous in the context of a *forum non conveniens* stay, where the foreign action rests on its own bottom, it is less clear that it should be regarded as such in the transfer context. In the latter case, the initial court is merely making a request that the foreign court accept a transfer of the proceeding, a request that the foreign court is at liberty to decline. In that context, including a condition—even one that binds the receiving court—is not necessarily presumptuous. This is particularly so when it is recalled that a transfer request might be made at any point in the proceeding. While most will be made early on, the *CJPTA* does not preclude transfers being made later in a proceeding. In such circumstances the initial court might well want to impose conditions requiring a receiving court, if it should accept the transfer, to respect and abide by certain rulings the initial court had made before the transfer.
 12. The commentary was published along with the *CJPTA*, *supra* note 1.
 13. Black, Pitel & Sobkin, *supra* note 10, ch 9. This chapter also explores whether the proceedings transfer provisions of the *CJPTA* might in part be constitutionally infirm, an important question but one not pursued here.

the novel field of proceedings transfers remains *terra incognita*. It is unsurprising that lawyers have been cautious in exploring it.

There is little that is new in the area in the four years since *Statutory Jurisdiction* appeared. Rather than repeat its contents here, this paper explores the state of Part 3 of the *CJPTA* through a close examination of a single case: *Hudye Farms Inc v Canadian Wheat Board*.¹⁴ This dispute, which resulted in decisions by both the Saskatchewan Court of Queen's Bench and the Saskatchewan Court of Appeal, is the closest thing we have to a leading case on the *CJPTA*'s proceedings transfer provisions. In her unanimous judgment in *Hudye CA*, Justice Jackson set forth a step-by-step template or schema for how transfer applications should be assessed. Her reasons, and in particular that template, have been quoted and cited with approval both by subsequent Saskatchewan decisions (including one by the Court of Appeal)¹⁵ and by two rulings of the British Columbia Court of Appeal.¹⁶ The first instance and appeal judgments in *Hudye* encapsulate and exemplify much of what is commendable and encouraging in the *CJPTA* proceedings transfer decisions to date, including a willingness to be adventurous and initiate a transfer from a *CJPTA* province to a non-*CJPTA* one.¹⁷ At the same

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14. *Hudye Farms Inc v Canadian Wheat Board*, 2011 SKQB 29, 368 Sask R 157 [*Hudye QB*], *Hudye Farms Inc v Canadian Wheat Board*, 2011 SKCA 137, 342 DLR (4th) 659 [*Hudye CA*].
 15. See *Microcell Communications Inc v Frey*, 2011 SKCA 136 at para 112, 342 DLR (4th) 513. *Hudye CA* was quoted in multiple Court of Queen's Bench cases. See e.g. *Ping Leung v Apk Holdings Ltd*, 2013 SKQB 382 at para 11, 431 Sask R 291; *Yara Belle Plaine Inc v Ingersoll-Rand Company*, 2014 SKQB 254 at para 28, [2014] 11 WWR 140; *Babey v Greer*, 2015 SKQB 219 at para 26, 473 Sask R 119, rev'd 2016 SKCA 45, 396 DLR (4th) 394; *Cupola Investments Inc v Remai*, 2016 SKQB 359 at paras 17-18, 273 ACWS (3d) 519.
 16. *Preymann v Ayus Technology Corp*, 2012 BCCA 30 at paras 34, 41-44, 32 BCLR (5th) 391 [*Preymann*]; *Douez v Facebook, Inc*, 2014 BCSC 953 at para 31, 242 ACWS (3d) 774, rev'd 2015 BCCA 279, 77 BCLR (5th) 116. *Hudye CA* was also approved by the Supreme Court of Canada in *Douez v Facebook, Inc*, 2017 SCC 33 at para 21, 97 BCLR (5th) 1 [*Douez SCC*]. However, the Court did not single out the scheme in question. *Preymann* and *Hudye CA* were cited and quoted on this point in *Winvan Paving Ltd v Gencor Industries, Inc*, 2015 BCSC 233 at para 28, 250 ACWS (3d) 246.
 17. The Saskatchewan courts had first embraced this in *Walling v Walling*, 2007 SKQB 43, 294 Sask R 256, where the judge was prepared to consider a transfer request to the courts of Alberta. In *Tochor v Rudensky*, 2016 SKQB 52, 264 ACWS (3d) 635, the court thought that it had the power to request a transfer to Ontario but ultimately did not do so since it thought Saskatchewan was the *forum conveniens*. Likewise the courts of British Columbia and Nova Scotia have been prepared, under the *CJPTA*, to consider and sometimes make transfer requests to the courts of non-*CJPTA* provinces. See e.g. *Knapp Consulting Inc v Continovation Services Inc*, 2012 BCSC 887, 216 ACWS (3d) 630; *Wilson v Wilson*, 2013 NSSC 427, 341 NSR (2d) 86.

time, both decisions illustrate some of the chronic shortcomings in the case law on that subject. And finally, as we shall see, what happened in that case after the Saskatchewan Court of Appeal granted the application for a transfer request also tells us something about the state of the law regarding proceedings transfers.

The dispute arose out of a contract that had an exclusive forum-selection clause in favour of Manitoba. When the plaintiffs sued in Saskatchewan, the defendant Wheat Board brought an application to give effect to the choice-of-forum clause. First, it asked the Saskatchewan Court of Queen's Bench to hold that it lacked territorial competence over the proceeding. Second, the defendant argued that if the court should conclude that it had territorial competence, it should decline to exercise it. Third, the Wheat Board asked for an order transferring the proceeding to Manitoba. At first instance, Justice Sandomirsky concluded that he had territorial competence, declined to exercise it in light of the forum-selection clause, and concluded as follows: "A transfer of these proceedings to the Court of Queen's Bench of Manitoba pursuant to s. [13](1)(a) of the *CJPTA* is warranted and I so order."¹⁸

The holding on territorial competence was not appealed, but the other two were. In upholding the decision to decline jurisdiction and initiate a transfer to Manitoba, Justice Jackson first noted that the Supreme Court of Canada had endorsed the efficacy of forum-selection clauses in *ZI Pompey Industrie v ECU-Line NV*,¹⁹ a non-*CJPTA* case. She then laid out a step-by-step template for how a court should go about deciding a *CJPTA* case where a defendant took issue with a plaintiff's decision to bring an action in the non-chosen court contrary to a forum-selection clause:

18. *Hudye* QB, *supra* note 14 at para 44. An explanation is needed for the square brackets in the quoted passage. The court's original language referred not to s 13(1)(a) but to s 12(1)(a). Saskatchewan's *CJPTA*'s section numbers differ from those in the uniform and British Columbia *CJPTA*s because, mistakenly, Saskatchewan did not adopt s 6, the forum of necessity provision (see Black, Pitel & Sobkin, *supra* note 10 at 36). Jumping back and forth between the Saskatchewan section numbers and those in the uniform *CJPTA* would be confusing, so I have used the numbering of the uniform *CJPTA* throughout, even when referring to the Saskatchewan Act. That is, to reduce confusion I have altered the quotations from *Hudye* QB to reflect the numbering in the uniform *CJPTA*.

Note that the result in this case permitted the forum-selection clause to affect not only the parties to the contract in which it was contained but also the two plaintiffs who were not parties to that contract. For a discussion of this matter, see Vaughan Black & Stephen GA Pitel, "Forum-Selection Clauses: Beyond the Contracting Parties" (2016) 12:1 J Private Int'l L 26.

19. 2003 SCC 27, [2003] 1 SCR 450 [*Pompey*].

When a defendant applies pursuant to the *CJPTA* for an order that the Court decline competence over an action, the framework for analysis takes this general form:

1. Does the Province have territorial competence over the matter? If no, the action cannot continue. It may be appropriate in a given case to bypass this issue and proceed to the next step.
2. If the Province has territorial competence or assuming territorial competence, has the defendant/applicant established that the forum selection clause is valid, clear and enforceable and that it applies to a cause of action before the Court? If no, the application fails.
3. If the forum selection clause is valid, clear and enforceable, and it applies to a cause of action before the Court, has the plaintiff/respondent shown strong cause why the Court should not give effect to the forum selection clause?
4. If the plaintiff/respondent has not shown strong cause why the Court should not give effect to the forum selection clause, the Court should consider, according to the application before it, whether it is appropriate to transfer the proceeding to some other territory pursuant to Part III of the *CJPTA*.²⁰

While there is nothing especially startling in this schema, it is nevertheless worth considering in some detail. A step-by-step examination of the *Hudye CA* framework does not raise all the important issues under Part 3 of the *CJPTA*, but it does consider many of them. In addition, looking at how the template was applied in that case and what happened next raises other points of interest.

The first of these arises from the opening step in Justice Jackson's four-stage framework—a step that is potentially misleading. *Hudye CA*'s template says that a court should first determine whether it has territorial competence over the matters. So far so good. But then it adds that if the court concludes that it

20. *Hudye CA*, *supra* note 14 para 12. Although the quoted template deals with the situation where a *defendant* applies for an order that the initial court decline competence, it is worth noting that the option of a transfer request opens up the possibility that a plaintiff might make such an application. A plaintiff who wanted to sue in province A but was faced with the fact that province A lacked territorial competence might start a suit in province B, a *CJPTA* province that had territorial competence, and then immediately follow up with an application to the court in province B asking that it decline competence and issue a transfer request to the courts of province A. Such a request is possible under section 14(1) of the *CJPTA*, in that if the initial court has both territorial and subject-matter competence it may issue a transfer request to a court in the province which lacks the former, so long as that requested court (1) has subject-matter competence and (2) is a more appropriate forum.

lacks territorial competence, “the action cannot continue.”²¹ The framework does not say more about what might be done if the initial court finds that it lacks territorial competence, implying that the only option in the event of a finding of lack of territorial competence is a dismissal.²²

Yet a dismissal is not the only option. Contrary to what *Hudye CA*'s framework suggests, Part 3 of the *CJPTA* provides that when the initial court concludes that it lacks jurisdiction, the action *can* still continue. That is one of Part 3's chief innovations. Of course, the action cannot continue in the original court—that is axiomatic. But, Part 3 sets out a process whereby the proceeding might continue elsewhere. Part 3 contains a provision authorizing courts which find that they lack territorial competence to make a transfer request to another court that has the requisite jurisdiction. That is, in *Hudye QB*, even if the trial judge had agreed with the defendant's initial claim that the courts of Saskatchewan lacked territorial competence, the *CJPTA* empowered him to make a transfer request, provided certain criteria were met (namely, that the initial court arrives at a determination that the requested court possesses both territorial and subject-matter jurisdiction).²³

It might seem picayune to take the Saskatchewan Court of Appeal to task on this point, since it was dealing with a case where the lower court had determined it had territorial competence, a finding that was not challenged on appeal. Yet, *Hudye CA* was purporting to lay down a general framework and other parts of its template spell out options the court did not pursue in the case before it. It is not unreasonable to expect completeness and exactitude in the framing of that template; the court should not have implied that a finding of lack of territorial competence was the end of the line. Moreover, a transfer even in the face of a lack of territorial competence might easily have arisen in *Hudye QB*. Recall that at first instance the defendant Wheat Board asked for (1) a finding of no territorial competence, (2) in the alternative, if competence existed, an exercise of the court's discretion to decline to exercise jurisdiction, and (3) a transfer request. The third item—the transfer request—was not something the defendant asked for only in the event that the court should conclude that it had jurisdiction but would decline to exercise it. Rather, the defendant apparently wanted the transfer

21. *Hudye CA*, *supra* note 14 at para 12.

22. This reading is further justified by the remainder of the framework, which implies that the only way a court can get to a transfer request is if it determines it should discretionarily decline to exercise its territorial competence. In connection to this, the final sentence of paragraph 1 of the *Hudye CA* framework is also open to objection. See *Hudye CA*, *supra* note 14 at para 1.

23. *CJPTA*, *supra* note 1, s 14(2).

request to be issued even if the court concluded it lacked territorial competence. That being the case, for *Hudye CA* to set out a schema suggesting that a finding of no competence would necessarily put an end to the matter was unhelpful.

This leads to a further point, one arising from a lacuna in the template. In *Hudye QB*, there was never any express finding that the court to which the transfer request was directed had subject-matter competence in the proceeding. The same goes for *Hudye CA*. The matter was never put in issue, so perhaps the silence is understandable. Nevertheless, section 14(1) of the *CJPTA*, which deals with the type of transfer request in that case (the type where the initial court concludes it has territorial competence but that another court is more appropriate), sets out two preconditions that must be satisfied before such a request can be issued. The first precondition is that the receiving court is the more appropriate forum for the proceeding. Both the *Hudye QB* and *Hudye CA* judgments spent a lot of time on this issue. The second precondition is that the receiving court has subject-matter competence in the proceeding. Neither court addressed this. Perhaps more crucially, the *Hudye CA* template makes no mention of it.²⁴ It would have been helpful for it to do so.

The problem might not have arisen had the courts in both *Hudye QB* and *Hudye CA* been more specific about which of the *CJPTA*'s two transfer request provisions they were relying on. Recall that in *Hudye QB*, Justice Sandomirsky had concluded: "A transfer of these proceedings to the Court of Queen's Bench of Manitoba pursuant to s. [13](1)(a) of the *CJPTA* is warranted and I so order."²⁵ A reference to a specific section of the *CJPTA* is welcome; sometimes transfer requests are initiated but no section of Part 3 of the *CJPTA* is referenced in the court's reasons.²⁶ This can prove problematic as there is more than one section empowering transfer requests and it can be important to know which section is being invoked. The difficulty with *Hudye QB*'s mention of section 13 is that it is the incorrect—or at least not the ideal—section. The court refers to section 13(1)(a) but nothing in section 13 authorizes a court to make a transfer. Rather, section 13, which is headed "General provisions related to transfers," is just a preambular, introductory section. It is the opening section in Part 3 of the *CJPTA* and does little more than to provide an overview for the specific, empowering

24. Note that the requirement that one court determine whether a foreign court has subject-matter competence over a proceeding raises a choice of law question: which law the former court should apply in making this determination. See *ibid*, s 14(3) (specifying that the law of the prospective transferee state must be applied).

25. *Hudye QB*, *supra* note 14 at para 44.

26. See *e.g.* *O'Connor v Chapman*, 2007 BCSC 657, 173 ACWS (3d) 800; *Broman v Machida Mack Shewchuk Meagher LLP*, 2010 BCSC 760, 189 ACWS (3d) 702.

sections that follow. My point here may appear pedantic, but I hope it is not entirely so. Transfer requests can be of different sorts. Transfers under section 14(1) have different preconditions and consequences than those under section 14(2), and courts should be clear about which sort of transfer they are initiating. In the type of transfer at issue in *Hudye* QB, where the initial court has both territorial and subject-matter competence, that court cannot request a transfer unless the court to which it contemplates issuing a request has subject-matter competence in the proceeding, even where it determines that the other court would be the more appropriate forum for the proceeding.²⁷ Moreover, the initial court's determination of whether the potential requested court would have subject-matter competence must be made according to the law of that potential requested court.²⁸ So *Hudye* QB's reference to section 13, adopted by *Hudye* CA, is less helpful than a reference to the specific empowering section would have been.

Moving on with the *Hudye* CA template, steps 2 and 3 generate a further comment—one that applies to *forum non conveniens* applications regardless of whether they are accompanied by transfer requests. That grows out of the difficulty

27. *CJPTA*, *supra* note 1, s 14(1)(a). For an example of a decision which does a better job in this regard, see *Wheatland Industrial Park Inc (Re)*, 2013 BCSC 27 at paras 39-40, 42 BCLR (5th) 177 [*Wheatland*]. In *Wheatland*, the court identifies the subsection of the *CJPTA* under which it is purporting to issue a transfer request (and moreover specifies that it is making a *request*, not ordering a transfer) and goes on to make express findings that the relevant preconditions are satisfied. The decision is interesting in that it involves a section 13(2) transfer—that is, one where the initial court lacks subject-matter jurisdiction. The court finds this condition to be fulfilled due to the remedy requested by the petitioners. The dispute involved land in Alberta and the limitation arising from *British South Africa Co v Companhia de Moçambique*, [1893] AC 602 (HL), [1891-94] 4 All ER Rep 640 [*Moçambique*]. Had the petitioners requested a different remedy, the court might have been able to invoke the exception that permits judges to issue *in personam* orders affecting foreign land found in cases such as *Minera Aquiline Argentina SA v IMA Exploration Inc*, 2006 BCSC 1102, 58 BCLR (4th) 217, *aff'd* 2007 BCCA 319, 68 BCLR (4th) 242 (which the court in *Wheatland* referred to at para 21). However, the remedy requested by the plaintiff in this instance did not fall within that exception. *Wheatland* thus appears to stand for the proposition that the question of whether a court has subject-matter jurisdiction over a claim (at least for the purposes of the transfer provisions of the *CJPTA*) may depend on the remedy a plaintiff requests. The distinction is a key one. As with a number of (perhaps most) cases in which a court issues a transfer request, the transfer in this case never happened. Following the decision in favour of a transfer request, the plaintiffs started another action in British Columbia claiming a remedy (damages) that did not run afoul of the *Moçambique* rule and the defendants did not pursue the transfer request. Email from Kevin Loo, Counsel for respondent joint ventures in *Wheatland*, to Vaughan Black (15 September 2016) [unpublished, on file with author].

28. *CJPTA*, *supra* note 1, s 14(3).

resulting from the fact that the *CJPTA*'s *forum non conveniens* considerations, though expansive, make no mention of how to evaluate applications to exercise judicial discretion and decline to hear a matter allegedly brought in breach of a forum-selection clause in favour of a foreign court. The text of the *CJPTA* appears to subordinate all *forum non conveniens* applications to the "most appropriate forum" question, without mention of the fact that the parties might have dealt with the matter contractually. This statutory language might be read as standing in opposition to the Supreme Court of Canada's holding that such clauses should almost always be given effect.²⁹ This is a recurring problem.³⁰

In *Hudye QB*, Justice Sandomirsky had proceeded on the basis that the Supreme Court of Canada's decision in *Pompey* meant that, in the absence of strong cause for overriding the forum selection clause, he did not have to consult the *CJPTA*'s list of discretionary factors for declining jurisdiction.³¹ *Hudye CA* imposed a different, and preferable, approach. It held that consideration of a forum-selection clause (and *Pompey*'s strong cause test for the enforceability of such a clause) falls within the *CJPTA*'s listed *forum non conveniens* factors.³² Its template then separates and orders the steps a court should take in deciding whether to decline jurisdiction due to a forum selection clause exclusively designating another forum: the court should first determine that the clause is valid, clear and enforceable; next, that the clause applies to the cause of action before the court; and finally, if the first two steps are satisfied, that the plaintiff has not demonstrated strong cause why the clause should not be enforced.³³ This approach to reconciling the strong cause test with the *CJPTA* does less violence to the text of the *CJPTA* than the approach taken in *Hudye QB*, and the framework's step-by-step parsing of the matter should be useful to lower courts.

The next point arises from step 4 of the *Hudye CA* framework, which specifies that when the strong cause test has not been met "the Court should consider, according to the application before it, whether it is appropriate to transfer the

29. *Pompey*, *supra* note 19.

30. See Black, Pitel & Sobkin, *supra* note 10 at 207-11; Stephen GA Pitel & Nicholas S Rafferty, *Conflict of Laws*, 2nd ed (Toronto: Irwin Law, 2016) at 129-30; *Douez SCC*, *supra* note 16 at paras 17-22.

31. *Hudye QB*, *supra* note 14 at para 45.

32. *Hudye CA*, *supra* note 14 at para 11.

33. *Ibid* at para 12.

proceeding”³⁴ The court in *Hudye* QB proceeded by exercising its discretion twice: first to decide whether to decline to assert its territorial competence, and second, having held that it should not, to decide whether to issue a stay or initiate a transfer. That is, having first determined that it should decline to exercise its competence, the court thought it had to address which of two responses to take—imposing a stay or a transfer.³⁵ Such an approach—akin to first deciding the right, then selecting the best remedy—seems natural. Yet note that under the *CJPTA* both of those questions should be answered in light of the same considerations. The *CJPTA* provides that the decision whether to decline to exercise territorial competence must be made in light of a determination whether the local court or a foreign one is “a more appropriate forum to try the proceeding,” and it goes on to list some factors for making this determination.³⁶ Similarly, the provision of the *CJPTA* dealing with transfer applications provides that that the question of whether a transfer should be ordered is to be decided by the same criterion: whether the receiving court “is a more appropriate forum for the proceeding.” The *CJPTA* requires this assessment to be made in light of the same list of factors employed in deciding whether to decline jurisdiction. This appears to necessitate that the court consider the same question twice. Can it do so and still, as *Hudye* QB implies, reach different results—that is, can the court hold that for the purposes of declining jurisdiction the foreign court is more appropriate, but that for the purposes of initiating a transfer it is not?

Hudye QB proceeded as though there was nothing problematic about this. Having decided that it should decline jurisdiction, the court then had to choose between a stay and a transfer. It noted that “as there is no proceeding pending in Manitoba over the same issues between these parties, striking out the Saskatchewan proceeding is not appropriate. A stay of the Saskatchewan proceedings is not economically or otherwise practical.” That is, it looked at matters that were not pertinent to the determination of the most appropriate forum but rather to the choice between a stay and a transfer. This is to treat section 14(1)(b) of the *CJPTA* as if it authorizes a transfer request based on “whether the receiving court is a more appropriate forum for the proceeding

34. *Ibid* at paras 12, 14. A question arises whether the words “according to the application before it” imply that a court can only contemplate a transfer request if one of the parties requests it, and never *proprio motu*. The text of the *CJPTA* is not conclusive on this point. Despite the wording of step 4 of the *Hudye* CA framework, the answer, at least in Saskatchewan, seems to be that a court can act on its own motion. For an exploration of this matter, see Black, Pitel & Sobkin, *supra* note 10 at 223-24.

35. *Hudye* QB, *supra* note 14 at para 44.

36. *CJPTA*, *supra* note 1, s 11.

and, all things considered, a transfer is a more appropriate response than a mere stay of proceedings.” The italicized words are, of course, not part of section 14(1)(b). It might have been better if they were, and *Hudye* QB operates as if they are.

Hudye CA’s four-step framework is less than clear on whether this is the right way to proceed. However, it does not preclude this method. Moreover, the court of appeal did not take issue with *Hudye* QB, so perhaps we may regard this approach as having appellate approval. The two-stage approach seems the clearly preferable one. Both the decision to decline jurisdiction and the decision whether to issue a transfer request are discretionary matters. Interpreting the *CJPTA* so that the transfer decision is made in two steps—first in light of the most appropriate forum test, and next in light of the relative merits of a stay vis-à-vis a transfer³⁷—may not be perfectly faithful to the wording of the *CJPTA*, but does little violence to it, and its “right then remedy” methodology allows a more nuanced assessment of the considerations at stake.

Having set out its template, *Hudye* CA then applied it. Justice Jackson concluded that she saw “no basis to set aside Sandomirsky J.’s decision to decline territorial competence, in relation to the whole of the action, and to transfer the proceedings to Manitoba.”³⁸ It will be recalled that Justice Sandomirsky had concluded that he should *order* a transfer. The problem with the language used both in *Hudye* QB and *Hudye* CA is that nothing in the *CJPTA* empowers a court to order a transfer. The *CJPTA* only enables the initial court, once the requisite preconditions are satisfied, to order a *request* to another court that the requested court accept a transfer. It takes two to tango and two to transfer a proceeding. If, and only if, the second court accepts the request does the transfer become effective, and when that request is made no further order from the initial court is needed. Of course, little harm will come from the initial court saying in its reasons that it will *order* a transfer. The court order, when it is issued, will almost certainly take the form of a request. Still, there is something to be said for the courts tracking the language of the statute more carefully than the reasons in *Hudye* QB and *Hudye* CA did.³⁹

There is a final feature of the *Hudye* Farms litigation, one that arises not from what the courts wrote but from what happened, or did not happen, after

37. It should be noted that a court should not grant both remedies—a stay and a transfer request. If it first stays the action and then initiates a transfer request that is later accepted, the transferee court will have inherited a stayed action.

38. *Hudye* CA, *supra* note 14 at para 19.

39. Some later Saskatchewan cases have done better. See *e.g. Geissler v Geissler*, 2018 SKQB 14 at para 56, 2018 CarswellSask 8 (WL Can), where the court decides “to request the Nova Scotia Supreme Court (Family Division) to accept a transfer of this proceeding...”

the appeal court confirmed the Court of Queen's Bench decision. The proceeding was discontinued.⁴⁰ What happened in the case of *Hudye* seems to have happened in other successful transfer applications, too. Looking first at the reported cases, there is a dearth of proceedings where one can discover both the initial decision initiating the transfer and the continuation of the proceedings in the accepting jurisdiction.⁴¹ Of course, many matters are not reported, so the law reports and decisions databases are not definitive on this point. However, my inquiries to counsel have turned up other cases where courts have consented to issue a transfer request but the parties then elect not to pursue the matter.⁴²

It is far from clear that we should be either surprised or concerned about the fact that few successful transfer request applications result in actual transfers that are then continued in another province or country. It is common for a civil action to be settled or abandoned after an initial court skirmish. This happens after successful *forum non conveniens* motions and one would expect the same to occur after a successful transfer request application. Moreover, the events that took place shortly after the decision in *Hudye CA*—the effective dismantling of the Wheat Board, or at least the end of its monopsonic⁴³ status—possibly had something to do with the demise of the action.

Apart from the fact that judgments authorizing transfer requests may not result in complete transfers, it was noted above that not many transfer requests are brought in the first place. It is not clear we should lose sleep over that either. There may be many practical reasons why it is easier to reach the same result by simply convincing the initial court to stay or dismiss an action and requiring a plaintiff to start afresh elsewhere. Still, the infrequency of applications for transfers, and the downright rarity of successful transfers, is cause for some comment.

I suggested above that it was in part the novelty, and perhaps relative complexity, of the proceedings transfer provisions (Part 3) of the *CJPTA* that

40. Email from James E McLandress, General Counsel and Corporate Secretary of Winnipeg Airports Authority Inc, to Vaughan Black (13 September 2016) [unpublished, on file with author]; Email from Jordan Hardy, Counsel in *Hudye CA*, to Vaughan Black (8 October 2016) [unpublished, on file with author]. It seems that a Manitoba court did accept the transfer request, but then the action went nowhere.

41. Contrast this with transfers under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, s 187(1), where one can read both the first decision initiating the transfer (see *e.g. Andre Tardif Agency Ltd v Burlingham Associates Inc*, 2013 ONCA 46, 225 ACWS (3d) 606) and the subsequent continuation of the proceeding in another province's courts (see *Andre Tardif Agency Ltd v Burlingham Associates Inc*, 2015 SKQB 87, 253 ACWS (3d) 518).

42. See *e.g.* the proceedings in *Wheatland*, *supra* note 27.

43. This change in status of the Wheat Board was a result of the coming into force of the *Marketing Freedom for Grain Farmers Act*, SC 2011, c 25.

explained their slow uptake in practice. In connection to this point, I conclude with one very modest suggestion for making those provisions more user-friendly: Those responsible for crafting civil procedure rules should do more to implement rules that facilitate *CJPTA* proceedings transfers. It was always contemplated that provinces adopting a *CJPTA* would make complementary changes to their rules of court to smooth and expedite its application. The ULCC's commentary on the *CJPTA* states as much.⁴⁴ However, Nova Scotia has done nothing on this score, either with respect to territorial competence or proceedings transfer.⁴⁵ British Columbia's *Supreme Court Civil Rules* do, in fact, have a short post-*CJPTA* rule touching on proceedings transfers. However, it deals mainly with translation of documents relating to a proceeding transferred from a foreign court and is very brief. For instance, it is far less comprehensive and detailed than BC's court rules relating to transfer of a proceeding from the Provincial Court to the Supreme Court.⁴⁶ Only Saskatchewan has made a significant effort in this regard, and it did so belatedly. Only in mid-2013, more than nine years after it had brought its *CJPTA* into force, did Saskatchewan add detailed sections to its Queen's Bench Rules (and a corresponding form) dealing with *CJPTA* proceedings transfers.⁴⁷ Even those are hardly comprehensive.

By way of contrast, consider the English rules of court with respect to their statutory transfer provisions most analogous to those in the *CJPTA*. England has no general provision comparable to Part 3 of the *CJPTA*. No country does.⁴⁸ But England does have a provision of limited applicability that is in many respects similar to Part 3, and which relates to child custody proceedings. There, cross-border transfers of court proceedings are permitted if a transfer is in the best interests of the child. These are permitted under both article 15 of the Brussels

44. See *CJPTA*, *supra* note 1, comment 5.1.

45. There are provisions in the *Nova Scotia Civil Procedure Rules* dealing with transferring proceedings from one judicial district to another within Nova Scotia (r 59.03(2)), transferring from the Family Division of the Supreme Court to the Family Court (r 60A.04(4)), and transferring motions to be heard outside a court room to a court room (r 22.16), but none dealing with cross-border transfers pursuant to the *CJPTA*. See Nova Scotia, *Nova Scotia Civil Procedure Rules* (official consolidation 6 June 2008 as amended 23 June 2017), online: <www.courts.ns.ca/Civil_Procedure_Rules/documents/cpr_consolidated_rules_17_06.pdf>.

46. See British Columbia, *Supreme Court Civil Rules*, BC Reg 168/2009, r 19-1, 19-4, as amended by BC Reg 3/2016. Rule 19-1 governs transfer of proceedings from Provincial Court, and rule 19-4 governs transfer of proceedings from foreign courts.

47. See Saskatchewan, *Queen's Bench Rules*, r 13-61-13-64; *ibid*, forms 13-63A, 13-63B.

48. For a brief account of proceedings transfer provisions in other countries see Black, Pitel & Sobkin, *supra* note 10 at 218-21, 247-49.

II-bis Regulation⁴⁹ and articles 8 and 9 of the *Hague Child Protection Convention of 1996*,⁵⁰ both currently in effect in England and Wales.⁵¹ The details of these two quite similar provisions are not pertinent here. It suffices to note that, at least in general conception, they are similar to Part 3 of the *CJPTA* in that they give an initial court the discretion to initiate a transfer of proceedings to the courts of another country, either at the request of a party or on its own initiative. The transfer may then take place if the request is made and the requested court agrees. As noted above, however, these provisions apply only in child custody matters and the discretion is to be exercised only where it serves the best interests of the child (not, for instance, efficient deployment of judicial resources).

There are two things to note for present purposes. The first is that England's Family Procedure Rules offer lengthy guidelines on how to go about the international transfer of a proceeding.⁵² They deal with how and to whom notice must be given, what must be filed, how quickly a court must act once an application has been received, how a potential transferee court should be contacted, how soon a receiving court must fix a hearing to deal with the future conduct of the case, and a variety of other matters. The second thing to note is that, in contrast to the situation under Part 3 of the *CJPTA*, in England there has been a lot of judicial activity under these provisions, including some by appellate courts.⁵³

Of course, there is no warrant for drawing a causal connection between England's relatively detailed court rules (compared with the rules of the *CJPTA* provinces, that is) and its ample case law. For reasons that will quite possibly

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49. EC, *Council Regulation (EC) 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility*, [2003] OJ, L 338/1 at 15 (commonly referred to as Brussels II-bis).
50. *Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in Respect of Parental Responsibility and Measures for the Protection of Children*, 19 October 1996, HCCH Convention No 25 (entered into force 1 January 2002) (commonly referred to as the Hague Child Protection Convention 1996). Canada is not a party.
51. Of course it remains to be seen how Brexit will affect the applicability of the former in England and Wales.
52. *The Family Procedure Rules 2010*, SI 2010/2955, r 12.61-12.67, online: <www.legislation.gov.uk/uk/si/2010/2955/part/12/made>. One interesting respect in which these rules differ from the *CJPTA* is that they also allow the courts of a potential transferee country to request the first-seized court to offer a transfer. That is, a party who craves a transfer can go to the court of the country to which he or she hopes a transfer can be made and request that court to contact the court initially seized and ask that court to offer to transfer the proceedings to it. See *ibid*, r 12.62(1)(b).
53. For a discussion of these cases, see Ian Curry-Sumner & Maria Wright, "Article 15 Brussels II-bis: Two Views from Different Sides of the Channel" (2015) 17:2 Eur J L Reform 352.

remain forever unclear and open to speculation, the ULCC was just wrong in thinking that there would ever be much practical use or appetite for a general cross-border proceedings transfer arrangement. If that is the case, then even the promulgation of detailed court rules will not create a situation where it is common to see a legal action started in one province and concluded in another. Courts and scholars will continue to be justified in referring to the *CJPTA* simply as a statute that clarifies and systematizes the territorial jurisdiction of the superior courts.